

Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox, and Swanson

From: Galena West, Counsel
John W. Wallace, Assistant General Counsel
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Subject: Public Identification of a Conflict of Interest for Public Officials Who Hold Offices Designated in Section 87200 - Adoption of Regulation 18702.5.

Date: February 21, 2003

I. Introduction.

The Political Reform Act¹ (the “Act”) prohibits a public official from “making,” “participating in making” or otherwise using his or her official position to “influence” a governmental decision in which the official has a financial interest. (Section 87100 et seq.) The procedure to determine if this prohibition applies is the Commission’s Eight-Step Process. This process is summarized as follows and is implicated by the new statute 87105 as well as the proposed regulation 18702.5:

Step One: Is the individual a “public official?”

Step Two: Is the public official “making,” “participating in making,” or “influencing” a governmental decision?

This step is critical to the application of both the new statute and regulation. A public official applies this step to determine whether he or she is involved in the governmental decision. Also, if the public official determines not to act regarding a governmental decision because of a financial interest, this step gives guidance as to what is required of the public official.

Step Three: What is the “economic interest” of the public official?

The various economic interests of a public official are as follows:

- *Business Interests.* An official has an economic interest in a business entity in which the official, the official’s spouse, the official’s dependent children, or anyone acting on the official’s behalf has invested \$2,000 or more.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

- *Business Position.* An official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management.
- *Real Property.* An official has an economic interest in real property in which the official, the official's spouse, the official's dependent children, or anyone acting on the official's behalf has invested \$2,000 or more (including leasehold interests).
- *Sources of Income.* The official has an economic interest in any person, whether an individual or an organization, from whom the official has received (or by whom the official has been promised) \$500 or more in income within the 12 months prior to the decision.
- *Sources of Gifts.* The official has an economic interest in anyone, whether an individual or an organization, which has given the official gifts totaling \$340 or more within the 12 months prior to the decision.
- *Personal Finances.* The official has an economic interest in the official's personal expenses, income, assets, or liabilities, as well as in those of the official's immediate family--this is known as the "personal financial effects" rule. If the decision will affect the official's personal finances by \$250 or more, then a conflict of interest exists.

Step Four: Are the public official's economic interests directly or indirectly involved in the decision?

Steps Five and Six: What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decisions upon their economic interest will meet this materiality standard?

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

NEW STATUTORY REQUIREMENT

Section 87105 was added to the Act by Assembly Bill 1797 (Harman). This bill creates specific identification and recusal requirements for public officials who hold an office specified in section 87200 ("87200 officeholders") when the official determines that he or she has a financial interest in a decision. This new section 87105 establishes additional requirements in Step 2 of the standard analysis. The new section provides:

"(a) A public official who holds an office specified in Section 87200 who has a financial interest in a decision within the meaning of Section 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:

"(1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that

disclosure of the exact street address of a residence is not required.

“(2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100.

“(3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

“(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue.

“(b) This section does not apply to Members of the Legislature.”

“A public official who holds an office specified in Section 87200” includes:

“elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.” (Section 87200.)

II. Background

In December 2000, the Commission adopted amendments (Project M of Phase 2) regarding the requirements imposed under Step 2 of the standard Eight-Step Process. (Regulation 18702.1, Appendix 1.) At that time, the Commission determined that mandatory public identification of a conflict of interest for all filers was not necessary and was duplicative of the disclosure already present in the Statements of Economic Interest (Form 700).² Such mandatory identification had been required since 1976. At

² A Statement of Economic Interest or Form 700 is the disclosure document that all public officials are required to file. The amount of disclosure necessary on Form 700 is determined by the public official's position and what is required for that position.

that meeting, the Commission decided to make identification under regulation 18702.1 a permissive requirement instead of a mandatory one. This decision regarding whether identification of a conflict of interest should be mandatory or permissive has now been considered by the Commission twice.

In Step 2 of the Eight-Step Process, the public official must determine if he or she is “making,” “participating in making,” or “influencing” a governmental decision. To determine if the public official is “making” a governmental decision, he or she applies the current regulation 18702.1. The disclosure duties are triggered when the public official determines not to act “because of his or her financial interest.” The public “official’s determination *may* be accompanied by an oral or written disclosure of the financial interest.” (Regulation 18702.1(a)(5), emphasis added.)

Regulation 18702.1(b) allows a public official to remain on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified with the qualification that his or her presence may not be counted towards achieving a quorum. Subdivision (c) states that a public official may not attend a closed session or obtain non-public information from a closed session regarding the governmental decision. These requirements would remain intact for all public officials who determine not to act under Step 2 with the exception of the public officials who will be covered by the new regulation and statute.

Regulation 18702.4 provides exceptions to when a public official is “making” or “participating in making” a governmental decision. This exception applies to all public officials and provides in subdivision (a)(2) that appearances by a public official as a member of the general public to represent himself or herself on matters related to personal interests listed in subdivision (b)(1) are not actions which fall into the categories of “making” or “participating in making” a governmental decision. Subdivision (b)(1) provides that the public official may appear in the same manner as the members of the public on “personal interests” such as:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercises sole direction and control.”

Also, regulation 18730(b)(10) provides instruction to a public official who has a conflict of interest. Under this regulation, designated employees *may* disclose the disqualifying interest when they determine not to act due to a potential conflict of interest. This rule includes conflicts of interest that usually occur in a non-meeting setting.

The requirement to leave the room after an identification of a conflict of interest has never been a requirement under the Act before the new section 87105 took effect on January 1, 2003. The Commission opposed AB 1797 for several reasons. The Commission determined that the disclosure required would be duplicative of the information already available in the Form 700, Commission resources would be put to better use in assuring that public officials are not participating when they have a conflict of interest rather than the manner of their disqualification, as well as the various application problems within the language (such as the lack of instruction regarding absent public officials and non-meeting settings).

The author of the bill, Assemblyman Harman, appeared before the Commission at the March 14, 2002 Commission meeting. He strongly urged the Commission to support the bill, and possibly even sponsor it. Assemblyman Harman stated that the purpose of his bill was to eliminate the confusion about what to do when a public official has a conflict of interest. He wanted clear, simple rules while only providing examples of how the bill would apply in meeting settings. The author's purpose was also stated in the Senate Rules Committee analysis of the bill from August 6, 2002. Assemblyman Harman's reason and purpose in writing the bill is stated as "the regulations that a public official must follow once they determine that they have a conflict are not clear and often public officials receive conflicting advice from city attorneys and county counsels."

III. Discussion of Regulation 18702.5.

In order to interpret and apply new statute 87105, the Commission is asked to adopt proposed regulation 18702.5 (Appendix 2).³ At the Interested Persons Meeting held on February 6, 2003, significant public comment was received.⁴ Also, written comments were received from Mr. Alexander Abbe of Richards, Watson & Gershon and Lois E. Jeffrey, City Attorney for the cities of Laguna Hills and Tustin. (Attached as Appendix 3.) Several changes to the noticed regulation language are being offered as a result of further analysis, staff input as well as in response to the suggestions of the members of the public.

A. Scope of Application - Types of Meetings.

There are two significant scope issues in this regulation. The first is discussed below and pertains to what settings the regulation will apply (i.e. meetings only), the other pertains to what context the regulation will apply to section 87200 officeholders. These scope issues, as well as the other options and decisions within this proposed regulation, will determine what amendment to regulation 18702.1 would be necessary if regulation 18702.5 is adopted.⁵ For instance, if the application is limited to section 87200

³ This language has been modified since the language that was noticed on January 31, 2003.

⁴ The attendees at the Interested Persons Meeting on February 6, 2003 included representatives from a multi-county agency, a redevelopment agency, state agencies, multiple counties, a city and several private law firms.

⁵ The existing regulation 18702.1 is attached as Appendix 1.

officeholders but settings other than meetings are to be included, then the language providing the meeting limitation would be deleted.

An additional scope issue cannot be resolved in regulation 18702.5. It has been suggested that a rule wholly applicable to section 87200 filers may be difficult to apply. They suggest that application be as limited as possible or that the regulation be applicable to all filers. However, if the Commission wishes to reconsider the decision of December 2000 and apply the mandatory identification aspect of the statute to all filers as well as imposing the requirement to leave the room, then a more comprehensive amendment to regulation 18702.1 would be necessary.

SUBDIVISION (b)(1): Should the statute be limited in application to only meeting settings? [DECISION POINT 1]

DISCUSSION: Subdivision (b)(1) significantly limits the scope of the regulation by limiting its application to only meeting settings. The statute does not seem to contemplate an application beyond meetings. The statute first uses terms like “prior to the consideration of the matter,” “publicly identify” and “recuse” which all relate to a discussion and vote on a matter in a meeting setting. For example, a matter is “considered” at a meeting, but the “consideration of a matter” at your desk is not the regular usage of that phrase. Also, it is awkward to apply the “publicly identifying” requirement to an office setting. The term “recuse” is a term of art specifically used when a public official such as a judge or a city councilmember cannot participate. By using these terms, as well as the phrase “leave the room,” the author limits the practical application of the statute to meeting settings.

An alternate interpretation could lead to absurd results. For example, if the statute were applied to a city attorney discovering a conflict of interest when reading the papers on his or her desk, then the city attorney would have to publicly identify his interest, recuse himself or herself and leave the room. Therefore, to obtain clear, simple rules from the statute, application should be limited to meeting settings.⁶

RECOMMENDATION: Adopt the proposed regulatory language to limit the application to meeting settings. (Appendix 2, subdivision (b)(1).) The benefit of a broad interpretation is offset by absurd results. The wording of the statute, as well as its specific requirements, lead to the conclusion that this statute was intended to apply only to meeting settings. If the Commission wishes to expand this regulation to apply beyond meeting settings, then this regulation would need to be restructured to accommodate this change.

⁶ All of the people present at the Interested Persons Meeting held on February 6, 2003, agreed that this statute should only apply to meetings and be limited in general as much as possible.

B. Scope of Application - Included 87200 Officeholder Meetings

SUBDIVISION (b)(2): Should the scope of the regulation apply to section 87200 officeholders at all times or only in more limited circumstances? [DECISION POINT 2]

DISCUSSION: The new statute, by its terms, limits its application to 87200 officeholders.⁷ Specifically, the statute states that a “public official who holds an office specified in Section 87200 shall....” This language could be interpreted as a limitation to not only who is subject to the statute, but also when it applies. On the other hand, it could be argued that once someone “holds” an office, then the requirements of that specific office are tied to that person. The office and the public official are interchangeable.⁸ Staff is presenting three options regarding the interpretation of the scope of the language.

Decision Point 2, Option A: *Apply the statute where a public official acts in the capacity of his or her 87200 position.*

Under this option, the public official would only follow the identification requirements of this regulation when participating on a board, commission, etc. listed under section 87200 but would have no obligations under this regulation at any other time. By linking the instances that identification is necessary to the list of boards, commissions, etc. in section 87200, this application limitation becomes a checklist. If the 87200 officeholder is on a board, commission, etc. on the checklist, then he or she must follow the requirements in the regulation. If not, then only the existing requirements of regulation 18702.1 apply. Therefore, this option narrows the scope of the statute and avoids problems of mixed boards where the 87200 officeholder is the only public official subject to these rules (discussed in detail in Option B).

However, this option’s language and idea could be difficult to apply when considering some of the positions listed in section 87200. For instance, “other public officials who manage public investments” could have difficulty determining when they are at a meeting listed under section 87200. Creating a comprehensive list of those specific meetings would be difficult for some and would probably require legal assistance.

Decision Point 2, Option B: *Apply the statute where a public official acts in the capacity of his or her 87200 position as well as ex officio positions.*

This option adds the phrase “and is participating on a board, commission, etc. listed under section 87200 or is acting in that capacity by participating on a board or commission, etc. in an ex officio manner.” The reasoning for this option is that if the 87200 officeholder is on a board, commission, etc. other than the one he or she is on as a result of being the 87200 officeholder, then the regulation would not apply. However, if

⁷ Since regulation 18702.1 is already in existence as a general rule, there are now two rules that apply to public officials.

⁸ At the Interested Persons Meeting held on February 6, 2003, several members of the public at the meeting pointed out that the statute was difficult to apply, disruptive and should be limited as much as possible.

the public official is on that board or commission by virtue of the office he or she holds under section 87200, then the rule would apply. This option allows for a more limited application of the statute but extends further than Option A in that it reaches the 87200 officeholder at the other types of meetings where they participate because of their 87200 position, not just the ones listed under section 87200.

For example, if the Governor were on a board by virtue of holding the office of Governor, then he would be participating “ex officio” and would be subject to the rules of regulation 18702.5. However, if the Governor were on a board by choice, personal preference, etc. as himself or herself and not as the representative of the Governor’s office, then he or she would not be subject to this regulation.

This option could be difficult to apply. Public commenters noted that city attorneys and county counsels are not usually attending these smaller meetings and would not be present to advise the public official as to what capacity he or she is acting in, ex officio or otherwise. A clear rule would either apply to section 87200 officeholders in all capacities or spell out clearly when it did and did not apply.⁹

Decision Point 2, Option C: *Apply 87200 officeholders at any meeting.*

The plain language of the statute applies to “a public official who holds an office specified in Government Code section 87200.” This creates the requirement to identify, recuse and leave the room because of the fact that the public official holds that office. This links the requirements to the office. Once that person is an 87200 officeholder, then they remain so until they are no longer in that office. This interpretation of the statute provides a clear rule that is easy to apply because the responsibility is personal. The person who is the 87200 officeholder knows that whenever he or she participates in a meeting, then he or she has to follow the requirements of this regulation.

However, this option may have unintended consequences. If the 87200 officeholder is also on a transit authority in an ex officio capacity, for example, he or she would have to follow the public identification and recusal rules at those meetings since he or she is the 87200 officeholder. However, if it is a mixed board where some of the members do not hold offices under section 87200, then the 87200 officeholder may be the only member following this regulation at that meeting.

RECOMMENDATION: Adopt Option C. The statute would then apply to 87200 officeholders in any meeting. This creates a constant duty on the public official. The public official would then know that no matter what meeting they are participating in, their obligation to identify and leave the room under this regulation remains. With either Option A or B, the public official would not have a clear rule to apply. (Appendix 2.)

⁹ Mr. Alexander Abbe of Richards, Watson & Gershon (written comment, Appendix 3) also wanted to limit the application of the statute to only section 87200 officeholders when on boards or commissions contemplated under section 87200. He believes that any other interpretation goes beyond what the legislation was intended to accomplish.

C. Content & Timing of Identification.

SUBDIVISION (c)(1): When should this identification be required?

DISCUSSION: Subdivision (c)(1) identifies the timing necessary for the identification of the conflict of interest and the item. According to the regulation, the public identification should be made following the announcement of the item for discussion but before the discussion commences. This requirement satisfies the explicit language of the statute that the identification occur “immediately prior to the consideration of the matter.” (Section 87105(a).)

A commenter at the Interested Persons meeting on February 6, 2003 asked what would happen under this regulation if the public official realizes that he or she has a conflict of interest after a discussion begins on the item. Through the reference of the conflict of interest terms in its language, the statute has already incorporated the idea that the public official must know or have reason to know of the existence of a financial interest for a conflict of interest to exist. (Section 87100.) Thus, the obligation attaches at the time the public official knows or has reason to know of the conflict of interest. This wording of the timing requirement is also definite to obtain the clear rule intended by the statute.

D. Description of the Conflict of Interest.

SUBDIVISIONS (c)(1)(A) & (B): What level of detail is necessary to satisfy the statutory identification requirements?

DISCUSSION: The content of identification necessary to satisfy the statute is “in detail sufficient to be understood by the public.” Identification of the economic interest alone (subdivision (c)(1)(A)) without a more specific description of the type of economic interest (subdivision (c)(1)(B)) would not appear to fulfill the statutory requirement for identification. This is clear through reading the statutory requirements. After requiring that the identification be made “in detail sufficient to be understood by the public,” the next clause in that sentence provides an exception that “disclosure of the exact street address of a residence is not required.” If identification of the economic interest alone was sufficient, (i.e. investment, business position, etc.) then this exception for street addresses would be unnecessary. Therefore, additional identification must be necessary to meet the statutory requirements.

A similar requirement is within regulation 18708, the legally required participation exception. Regulation 18708 requires the conflict of interest be described “with particularity.” (Regulation 18708(b)(1).) New regulation 18702.5 borrows the concept and rules of regulation 18708. These factors have been effective in regulation 18708 and give sufficient detail to satisfy the statute. Only minor changes were made to update the language and for use in this regulation.

E. Form of Public Identification.

SUBDIVISION (c)(2): As noted above, the statute requires that the section 87200 officeholder “publicly identify” the conflict of interest “in detail sufficient to be understood by the public.” The issue is whether the identification should be required in verbal form or either verbal or written form. [DECISION POINT 3.]

DISCUSSION: Option A in subdivision (c)(2) requires a choice of what type of identification will be acceptable to satisfy the requirements of the statute. (Appendix 2.) The choices presented are oral identification only or either oral or written identification. The statute requires that the identification be made “immediately prior to the consideration of the matter” and that it be done “publicly.” (Section 87105(a) and (a)(1).) For this to occur, the public must be given the information at the time of its identification.

Written identification could limit the effectiveness of the statute. The statute is clear in that it requires the public official to “publicly identify” the conflict of interest “immediately prior to the consideration of the item” and then “leave the room.” When considering these three requirements together, the overall impression the statute gives is that the public official needs to let the public know what is happening at that meeting, at that time. This cannot be accomplished through a written identification placed in the record of the meeting. Even if handed out, the written identification may never be brought to the attention of the public and any members of the public participating from another location may be excluded from distribution of the writing. Of course, the requirement for written identification could include a requirement that the writing be read into the record. This would satisfy the statute but would be the same as requiring oral identification.

RECOMMENDATION: Staff recommends that Option A be deleted and the requirement be for oral identification only.

F. Recusal/Leaving the Room.

SUBDIVISION (c)(3): When does the public official recuse himself or herself and does he or she have to actually leave the room? [DECISION POINT 4.]

DISCUSSION: The statute requires recusal of the public official after the public identification of the conflict of interest but before the public official leaves the room. This language is included in this regulation in subdivision (c)(3) causing the recusal to occur just before the public official leaves the room in compliance with the plain wording of the statute.

In determining how much detail is necessary to make compliance possible for the “leave the room” requirement, the plain language of the statute gives a simple rule to follow. It has been suggested that if the public official is out-of-sight and cannot be heard, then the public official cannot influence the matter and one of the apparent goals of the statute is met. However, the statute clearly requires that the public official vacate the room.

Justifying allowing a public official to stand behind a partition, etc. would be difficult. Rules would be needed for each different meeting setting and fact pattern.

RECOMMENDATION: Adopt the proposed regulatory language to maintain the statutory requirement that the public official must leave the room. This would provide a clear, simple rule. (Appendix 2, subdivision (c)(3).)

G. Special Rules for Closed Session.

SUBDIVISION (c)(4): Should identification for closed sessions be permitted after the session as well as before it and should identification for closed sessions be oral or in writing? [DECISION POINT 3.]

DISCUSSION: At the Interested Persons Meeting, the suggestion that the identification be either before or after the closed session was made since more members of the public are usually in attendance after the closed session¹⁰. As provided above, the statute states that the identification and recusal must be completed “immediately prior” to the consideration of the matter. This has the benefit of being a bright line rule. Timing identification after the closed session would not meet this criteria as listed in the statute. Further, since the official is also required to leave the room, the identification in advance explains the public official’s absence. The same arguments as discussed above apply regarding whether oral or written identification should be required.

RECOMMENDATION: Staff recommends that Option A be deleted and the requirement be for oral identification with no special exception given to identification of the conflict of interest after a closed meeting.

H. Consent Calendars.

SUBDIVISION (d)(1): What procedure does a public official with a conflict of interest on a consent item follow?

DISCUSSION: A public official with a financial interest in a consent item (an uncontested matter) is specifically exempted from the requirement to leave the room in the statute. (Section 87105(a)(3).) However, the public official must still comply with the first two requirements of the statute, public identification of the matter and recusal of himself or herself. This is because the exemption is set forth in the section of the statute applicable only to the “leave the room” requirement and does not impact the first two requirements.

¹⁰ Originally, an exception from the identification requirements was given for a closed session meeting held independently of an open session. The Bagley/Keene Open Meeting Act section 11126.3, subdivisions (a) and (f) require that closed sessions be preceded and followed by an open session, so the exception was deleted.

As initially drafted, the regulation did not add any further description the “consent calendar” exception since the exception was written into the statute. At the Interested Persons Meeting, several participants requested additional clarification regarding the consent calendar issue. This request was echoed by written comments from Lois E. Jeffrey, City Attorney for the cities of Laguna Hills and Tustin. Thus, the exception language in subdivision (d)(1) was developed. The language does not change the statutory exception but does provide a procedure for public officials to follow.

I. *Absence.*

SUBDIVISION (d)(2): Should an absent public official have any identification or recusal obligations? [DECISION POINT 5.]

DISCUSSION: The statute says that a “public official who holds an office specified in Section 87200 who has a financial interest in a decision within the meaning of Section 87100 shall...do all of the following.” The statute then provides three exceptions from these requirements. The first is found in (a)(1) where “disclosure of the exact street address of a residence is not required.” The second is in (a)(3) where if “the matter has been placed on the portion of the agenda reserved for uncontested matters,” then the requirement to leave the room does not apply. The last exception is located in (a)(4) and gives the public official the right to “speak on the issue during the time that the general public speaks on the issue.” The plain wording of the statute, as well as its detailed list of exceptions, appears to imply that if the statute was intended to have an exception for absent public officials, it would have been included.

However, subdivision (d)(2) of the regulation states that this regulation imposes no duties on an absent public official. (Appendix 2.) The purposes for the public identification no longer exist when the public official is not present at the meeting. Although, by providing this exception, public officials will be permitted to leave the room before their item is called and not return until it is over and, therefore, avoid the public identification requirements. This is because the regulation includes the requirement that the identification, recusal and leaving of the room have to occur “immediately prior to the consideration of the matter.”

The author, Assemblyman Harman, spoke to the Commission about his bill at the March 14, 2002 meeting. At that meeting, Commissioner Knox asked the Assemblyman the following question, “Suppose a local official [] had not intended to attend the meeting in the first place, are they now required to show up and announce their conflict?” Assemblyman Harman then replied, “That’s not my intent. No.”

In this regulation, staff has written this exception as a general rule that applies whether the public official misses the entire meeting, leaves early, arrives late, or only misses one or two items. Treating public officials that are only absent for the item in which they have a conflict of interest differently would require an evaluation of excuses. If absent public officials are required to identify their interests, then a long list of variations would be necessary for vacationing public officials, emergency situations, public officials absent

for one item, public officials absent for half of the meeting, etc. These variations on the rule would defeat the easy applicability of the new regulation, which was a purpose of the statute.

RECOMMENDATION: Adopt the proposed regulatory language granting the exception to absent public officials. (Appendix 2, subdivision (d)(2).)

J. Speaking as a Member of the Public.

SUBDIVISION (d)(3): To what extent may a public official speak on the issue during the time that the general public speaks?

DISCUSSION: Section 87105 provides “(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue.” The statute could be read to provide for a very broad exclusion from its requirements under these circumstances.

However, it appears that the exception was a codification of the exception to 87100 for speaking as a member of the general public regarding a public official’s personal interests. Under regulation 18702.4, as discussed earlier, appearances by a public official as a member of the general public to represent himself or herself on matters related to personal interests listed in subdivision (b)(1) are not actions which fall into the categories of “making” or “participating in making” a governmental decision. Subdivision (b)(1) provides that the public official can appear in the same manner as the members of the public on “personal interests” such as:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercises sole direction and control.”

Staff would interpret section 87105 consistent with 18702.4. Under this construction, the statute would allow a public official to speak on personal financial interest outlined in regulation 18702.4. Commenters suggested that the section could be construed more broadly, to even allow speaking as a member of the public in cases where conflicts of interest result from the receipt of income or gifts. Construction of the new language in a manner inconsistent with the familiar exception in section 87100 and regulation 18702.4 could create confusion. Additionally, it would constitute an implied amendment to 87100, which has been construed to prohibit appearances, other than those set forth in regulation 18702.4, which has been construed by regulation since 1976.

This interpretation of the statute would require the public official to speak on the issue to remain in the room since the plain language exception allows for the public official to remain in the room so that he or she may “speak on the issue.” At the Interested Persons Meeting, commenters stated that public official should be allowed to stay in the room and listen if it is in regard to a personal interest. This lends power to the idea that public officials should not be required to speak to be allowed to hear the discussion on their personal interests. However, the literal language of the statute would require the public official to speak on the issue to remain in the room and there does not appear to be any room in the language to read it otherwise.

K. Confidential Information.

COMMENT: If the conflict of interest matter is a confidential item, how much detail must be disclosed?

DISCUSSION: The Comment duplicates the language of the Comment found in regulation 18708 to protect privileged information. To provide more description regarding when confidential materials must be disclosed or how much needs to be said when disclosing, a phrase has also been added to the description of the interest that needs to be described under subdivision (c)(1)(B). This regulation is not intended to require any confidences to be disclosed.

On the other hand, the Comment already makes it clear that any “confidences of a closed session as contemplated by law” are not required to be identified. Therefore, as in regulation 18708, this can be interpreted to mean that any information that is already protected by and through other laws will not have to be disclosed.

IV. Recommendations.

Staff recommends that the Commission approve for adoption the proposed regulation 18702.5 with the changes discussed in this memorandum.